

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to update the Commission's policies and procedures related to electromagnetic fields emanating from regulated utility facilities

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PUBLIC UTILITIES COMMISSION
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SAN FRANCISCO, CALIFORNIA
RULEMAKING 04-07-

ORDER INSTITUTING RULEMAKING

I. Summary

We open this rulemaking to examine the Commission's policies and rules related to electromagnetic fields (EMF) emanating from utility facilities. The Commission's current policies and procedures in this area predate research findings recently submitted to the Commission by the California Department of Health Services (DHS) as well as a decision of the California Supreme Court, SDG&E v. Covalt, 13 Cal 4th 893, (1996), concerning the extent of the Commission's jurisdiction related to EMF issues. This proceeding will reconsider the Commission's policies and procedures in light of these events and in light of the utilities' experiences in implementing existing policy.

II. Background

In 1991 the Commission opened an investigation (Investigation (I.) 91-01-012) in response to concerns raised by members of the public and the California State Legislature related to the possible health effects of EMF exposure from existing and planned utility facilities. The concerns were prompted by inconclusive international research results, some of which suggested a significant

statistical relationship between EMF exposure and various illnesses and others which did not find a link between EMF exposure and disease.

In 1993, in Decision (D.) 93-11-013, the Commission found that, while the evidence of direct harm from EMF was not conclusive, there was sufficient evidence that there is an EMF health hazard. (D.93-11-013, *mimeo.* at 3.) The Commission adopted several EMF policies and programs to address the public concern and scientific uncertainty. The Commission required the utilities to undertake no-cost EMF mitigation measures and implement low-cost mitigation measures to the extent approved as part of a project's certification process. "Low-cost" was defined to be within the range of 4% of the total cost of a budgeted project but the Commission specified that this 4% benchmark is not an absolute cap. (D.93-11-013, *mimeo.* at 14, 15.) The Commission endorsed the concept that any mitigation measure to be implemented should achieve some noticeable reduction in EMF, but declined to adopt a specific goal for EMF reduction pending further scientific evidence. (D.93-11-013, *mimeo.* at 15.) The Commission also adopted several EMF measurement, education, and research programs and chose DHS to manage the education and research programs. At the time the Commission declined to establish a measurement of EMF exposure that would be harmful to public health because the Commission concluded that it lacked a firm scientific basis for adopting any particular value. (D.93-11-013, *mimeo.* at 11.)

Several studies since the last Commission decision in 1993 have found correlations that prompt additional public concern. In 2002, pursuant to I.91-01-012, DHS released its final report reviewing scientific studies on the health effects of EMF. The panel of DHS scientists unanimously believed that EMF exposure can cause some degree of increased risk of childhood leukemia,

adult brain cancer, Lou Gehrig's Disease, and miscarriage. The three scientists of the DHS panel differed in their opinions concerning the connection of EMF with other diseases. One scientist was "prone to believe" and two were "close to the dividing line between believing and not believing" that EMF cause some degree of increased risk for adult leukemia. All three were undecided about the role of EMF and the risk of suicide. All were inclined to believe that EMF exposure does not cause an increased risk of breast cancer, heart disease, Alzheimer's Disease, or depression. They strongly believed that EMF do not increase the risk of birth defects or lower birth weight, and that EMF are not universal carcinogens.

Some of those concerned about EMF exposure pursued their concerns in the courts during the time the Commission was waiting for the conclusion of the DHS study. In one instance, where residents sought damages from San Diego Gas & Electric Company (SDG&E) for EMF exposure from an existing transmission line, SDG&E took the issue of EMF jurisdiction to the California Supreme Court. In SDG&E v. Covalt, 13 Cal 4th 893, (1996), the Court found that, given the Commission's continuing evaluation of the DHS four-year research program, Public Utilities Code Section 1759 applied regarding the Commission's regulation of EMF related to powerlines within its jurisdiction and that a cause of action for property damages from powerline EMF would impermissibly interfere with the Commission's regulatory policy.

In denying relief to the plaintiffs in this case, the Supreme Court deferred to an open rulemaking. (13 Cal 4th 893, 934 (1996)). The Court noted that the Commission has broad authority to determine whether the service or equipment of any public utility poses any danger to the health and safety of the public and to prescribe and order corrective measures. (13 Cal 4th 893, 923 (1996)). The Court interpreted the Commission's authority to require every public utility to

construct, maintain and operate its facilities and equipment in a manner that safeguards the health and safety of its employees, customers, and the public to include the Commission's decision to regulate EMF. (13 Cal 4th 893, 926 (1996)). The Court also pointed to the Legislative directive (Stats. 1988, ch. 1551, §2 subd. (d)) for the Commission and DHS to investigate the health risks associated with EMF and to submit a report with the results. (13 Cal 4th 893, 926 (1996)). In that statute, the Legislature specifically required the Commission to include in this report a comprehensive description of any cancer or other medical risks associated with exposure to electromagnetic fields, any higher incidence of leukemia or other cancers experienced by children who reside or attend school in close proximity to electric utility facilities, any increased incidence of cancer for electric utility workers, a summary of all studies associated with cancer or other medical risks which may be related to exposure to electromagnetic fields, and a listing of high-priority research projects required to identify cancer or other medical risks related to exposure to electromagnetic fields. (Stats. 1988, ch. 1551, §2). The Supreme Court held that any action it took regarding EMF would impermissibly interfere with the pending actions by the Commission on EMF.

Subsequently, the Court has found that not all claims alleged in a civil action filed pursuant to Pub. Util. Code section 2106 are banned by section 1759. Hartwell Corp. v. Superior Court, 27 Cal. 4th 256, 276-277, (2002). More recently in Orloff v. Pacific Bell, 31 Cal. 4th 1132, (2003), the Court recognized that "the PUC does not have exclusive jurisdiction over all actions against a public utility, and that the mere possibility of, or potential for, conflict with the PUC is, in general, insufficient in itself to establish that a civil action against a public utility is precluded by section 1759." (31 Cal. 4th 1132, 1138 (2003)). The Court found

that civil suits against public utilities actually complement Commission efforts because the Public Utilities Code authorizes the Attorney General, district attorney and city attorney to initiate enforcement actions against public utilities. (31 Cal. 4th 1132, 1153 (2003), Pub. Util. Code, §§7607, 7720, 7721).

Public concern about EMF and the activities utilities should undertake in response to those concerns continues unabated. In several transmission siting proceedings, for instance, such as the recent matters involving the Jefferson-Martin project (A.02-09-043) and the Mission-Miguel project (A.02-07-022), some parties and hundreds of community members expressed great concern regarding potential health effects from EMF exposure. Some parties have contested the adequacy of Environmental Impact Reports, prepared pursuant to the California Environmental Quality Act (CEQA), that do not consider EMF or propose routes that reduce or eliminate new exposures in populated areas. These parties express special concerns about exposures to schools, day care centers, and residences. These parties also object to the way that the utility applies the 4% benchmark in establishing its EMF exposure mitigation strategy. In such cases, we have considered EMF issues pursuant to Public Utilities Code § 1002. This pattern is repeated in each proceeding, adding expense and potential delay to each individual application to build a new transmission project. It is our goal that this rulemaking will facilitate more consistent and orderly consideration of EMF issues in future certificate proceedings.

III. Preliminary Scoping Memo

In this Preliminary Scoping Memo, we describe the issues to be considered in this proceeding and the timetable for resolving the proceeding. Principally, this rulemaking is the forum for review of existing EMF policy and the adoption of new rules, as appropriate. Although EMF issues continue to be raised by

parties in various individual transmission line proceedings, the Commission has yet to respond to the most recent DHS findings or the California Supreme Court decisions (13 Cal 4th 893, (1996); 27 Cal. 4th 256, (2002); 31 Cal. 4th 1132, (2003)) by clarifying the nature and limits of Commission activity in this area. In addition, the Commission has yet to examine the effects of the “no or low cost” mitigation policy that has now been in effect for more than a decade. We open this rulemaking to analyze these issues on a statewide basis.

The issues that we will explore in this rulemaking include the following:

1. Review and analyze the DHS research conclusions, developed in response to our ruling in D.93-11-013, as well as the findings of other relevant scientific studies that examine evidence, or the lack thereof, of EMF environmental effects that have adverse health effects on human beings.
2. Analyze the Commission’s current “low and no cost” mitigation policy and the extent to which implementation of the current policy has reduced or not reduced EMF exposure.
3. Determine what changes, if any, to the Commission’s current EMF policies are appropriate.
4. Determine whether to develop EMF standards or guidelines for use in transmission planning and siting and, if so, determine what those standards should be. In particular, examine whether CEQA standards should be adopted that consider EMF as an integral part of the CEQA analysis.

IV. Category of Proceeding

The Commission’s Rules of Practice and Procedure require that an order instituting rulemaking preliminarily determine the category of the proceeding

and the need for hearing.¹ As a preliminary matter, we determine that this proceeding is ratesetting because our consideration and adoption of EMF policies regarding utility transmission lines will establish mechanisms that affect respondents' costs, which will in turn affect respondents' rates.² At this time, we do not anticipate the need to hold evidentiary hearings, but recognize that parties' comments may identify the need for evidentiary hearings.

As provided in Rule 6(c)(2), any person who objects to the preliminary categorization of this rulemaking as "ratesetting" or to the preliminary hearing determination noted above shall state its objections in its responsive comments to this OIR. At or after the first prehearing conference (PHC) in this matter, the Assigned Commissioner will issue a scoping ruling making a final category determination; this final determination is subject to appeal as specified in Rule 6.4.

V. Schedule

The preliminary schedule shall be determined by a ruling of the Assigned Commissioner. This schedule will be discussed at, and further refined following, the first PHC as scheduled by the Assigned Commissioner and Administrative Law Judge. However, we expect to conclude this proceeding within the 18-month statutory deadline.

VI. Parties and Service List

The Executive Director should serve this order on the service lists for I.91-01-012, A.02-07-022 (Mission-Miguel), A.02-09-043 (Jefferson Martin),

¹ Rule 6(c)(2).

² Rule 5(c).

A.03-03-043 (Mission-Viejo), A.01-03-036 (Valley Rainbow) and A.99-11-025 (Tri-Valley).

Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and SDG&E are Respondents. Other regulated electric companies with service in California are encouraged to participate as well. Within 30 days of the date of mailing of this order, any person or representative of an entity interested in monitoring or participating in this rulemaking should send a request to the Commission's Process Office, 505 Van Ness Avenue, San Francisco, California 94102 (or ALJ_Process@cpuc.ca.gov) asking that his or her name be placed on the service list. The service list shall be posted on the Commission's web site, www.cpuc.ca.gov, as soon as it is practical. Since our order names PG&E, SCE, and SDG&E as Respondents to this rulemaking, by virtue of that fact, they will appear on the official service list.

Any party interested in participating in this investigation who is unfamiliar with the Commission's procedures should contact the Commission's Public Advisor's Office in San Francisco at (415) 703-2074 or in Los Angeles at (213) 649-4782, (866) 836-7875 (TTY – toll free) or (415) 703-5282 (TTY), or send an e-mail to public.advisor@cpuc.ca.gov.

In this proceeding, we intend to utilize the electronic service protocols given in Appendix A. Any party requiring paper service of documents in this case should so note that requirement in its request to be added to the service list.

VII. *Ex Parte* Communications

This ratesetting proceeding is subject to Pub. Util. Code § 1701.3(c), which prohibits *ex parte* communications unless certain requirements are met (see also, Rule 7(c)). An *ex parte* communication is defined as “any oral or written communication between a decisionmaker and a person with an interest in a

matter before the commission concerning substantive, but not procedural issues, that does not occur in a public hearing, workshop, or other public proceeding, or on the official record of the proceeding on the matter.” (Pub. Util. Code § 1701.1(c))(4).) Commission rules further define the terms “decisionmaker” and “interested person” and only off-the-record communications between these two entities are “*ex parte* communications.”³

By law, oral *ex parte* communications may be permitted by any commissioner if all interested parties are invited and given not less than three business days’ notice. If such a meeting is granted to any individual party, all other parties must be granted individual *ex parte* meetings of a substantially equal period of time and shall be sent a notice at the time the individual request is granted. Written *ex parte* communications may be permitted provided that copies of the communication are transmitted to all parties on the same day. (Pub. Util. Code § 1701.3(c); Rule 7(c).) In addition to complying with all of the above requirements, parties must report *ex parte* communications as specified in Rule 7.1.

O R D E R

Therefore, **IT IS ORDERED** that:

1. The Commission hereby institutes this rulemaking on its own motion to examine the Commission’s policies and rules related to electromagnetic fields (EMF) emanating from electric utility facilities and to evaluate what changes, if any, to the Commission’s current policies and rules should be undertaken in response to the California Department of Health Services study results and other studies since Decision 93-11-013.

³ See Rules of Practice and Procedure, Rules 5(e), 5(f), and 5(h).

2. Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company are Respondents to this proceeding.

3. The Executive Director shall cause this Order Instituting Rulemaking to be served on Respondents and on the service lists in Investigation 91-01-012, Application (A.) 02-07-022, A.02-09-043, A.03-03-043, A.01-03-036, and A.99-11-025.

4. Within 30 days from the date of mailing of this order, any person or representative of an entity interested in monitoring or participating in this rulemaking shall send a letter to the Commission's Process Office, 505 Van Ness Avenue, San Francisco, California 94102 or ALJ_Process@cpuc.ca.gov asking that his or her name be placed on the service list. Parties shall also appear at the first prehearing conference in order to enter an appearance in the proceeding.

5. All parties shall abide by the Electronic Service Protocols attached as Appendix A to this order.

6. We preliminarily determine that this is a "ratesetting" proceeding and that evidentiary hearings will not be required.

7. Any person who objects to the preliminary categorization of this proceeding or its preliminary hearing designation shall include such objection in its comments filed pursuant to this order.

8. Respondents shall, and other parties may, file comments within 45 days from the date of mailing of this order. Parties may file responses to comments 25 days thereafter. Once comments are received, the Assigned Commission shall provide guidance with regard to the next steps.

9. The scope and schedule set forth in this order may be modified by the Assigned Commissioner or Administrative Law Judge, as necessary.

This order is effective today.

R._____ LYN/edf/t05/mel

Dated _____, at San Francisco, California.

R._____ LYN/edf/epg

APPENDIX A

ELECTRONIC SERVICE PROTOCOLS

Party Status in Commission Proceedings

These electronic service protocols are applicable to all “appearances.” In accordance with Commission practice, by entering an appearance at a prehearing conference or by other appropriate means, an interested party or protestant gains “party” status. A party to a Commission proceeding has certain rights that non-parties (those in “state service” and “information only” service categories) do not have. For example, a party has the right to participate in evidentiary hearings, file comments on a proposed decision, and appeal a final decision. A party also has the ability to consent to waive or reduce a comment period, and to challenge the assignment of an Administrative Law Judge (ALJ). Non-parties do not have these rights, even though they are included on the service list for the proceeding and receive copies of some or all documents.

Service of Documents by Electronic Mail

For the purposes of this proceeding, all appearances shall serve documents by electronic mail, and in turn, shall accept service by electronic mail.

Usual Commission practice requires appearances to serve documents not only on all other appearances but also on all non-parties in the state service category of the service list. For the purposes of this proceeding, appearances shall serve the information only category as well since electronic service minimizes the financial burden that broader service might otherwise entail.

Notice of Availability

If a document, including attachments, exceeds 75 pages, parties may serve a Notice of Availability in lieu of all or part of the document, in accordance with Rule 2.3(c) of the Commission’s Rules of Practice and Procedure.

Filing of Documents

These electronic service protocols govern service of documents only, and do not change the rules regarding the tendering of documents for filing. Documents for filing must be tendered in paper form, as described in Rule 2, *et seq.*, of the Commission’s Rules of Practice and Procedure. Moreover, all filings shall be served in hard copy (as well as e-mail) on the assigned Commissioner and the ALJ. All e-mails shall be sent by 5:00 p.m. on the due date.

Electronic Service Standards

As an aid to review of documents served electronically, appearances should follow these procedures:

Merge into a single electronic file the entire document to be served (*e.g.* title page, table of contents, text, attachments, service list).

Attach the document file to an electronic note.

In the subject line of the note, identify the proceeding number; the party sending the document; and the abbreviated title of the document.

Within the body of the note, identify the word processing program used to create the document. (Commission experience indicates that most recipients can open readily documents sent in Microsoft Word or PDF formats)

If the electronic mail is returned to the sender, or the recipient informs the sender of an inability to open the document, the sender shall immediately arrange for alternative service (paper mail shall be the default, unless another means is mutually agreed upon).

Obtaining Up-to-Date Electronic Mail Addresses

The current service lists for active proceedings are available on the Commission's web page, www.cpuc.ca.gov. To obtain an up-to-date service list of e-mail addresses:

- Choose "Proceedings" then "Service Lists."
- Scroll through the "Index of Service Lists" to the number for this proceeding.
- To view and copy the electronic addresses for a service list, download the comma-delimited file, and copy the column containing the electronic addresses.

The Commission's Process Office periodically updates service lists to correct errors or to make changes at the request of parties and non-parties on the list. Appearances should copy the current service list from the web page (or obtain paper copy from the Process Office) before serving a document.

Pagination Discrepancies in Documents Served Electronically

Differences among word-processing software can cause pagination differences between documents served electronically and print outs of the original. (If documents are served electronically in PDF format, these differences do not occur.) For the purposes of reference and/or citation in cross-examination and briefing, all parties should use the pagination found in the original document.

(END OF APPENDIX A)